No. 93-889

(2)

Supreme Court, U.S.
FILED
JAN 3 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

WARREN deSAMBOURG, MARY BURNS deSAMBOURG, ALBERT L. SCHELL, JR., ROSALIE ELIZABETH TILLOY SCHELL, SADIE PERINO, JOSEPH PERINO, JOANN PERINO, LINDA PERINO, CHARLES MANCUSO, ANGELINA LICCIARDI MANCUSO, JOSEPH SEIBERT, SR., MARY SCIAMBRA SEIBERT, MARIE ELENA MELERINE, ANTHONY LaGRECO, JR., SALVADORE DiCARLO, EMILE LaGRECO, JOSEPH LaGRECO, LINDA ANN MUSTACCHIA LaGRECO, EDMOND E. HIMEL, JR., ERICA J. HIMEL HEIER, and HENRY G. HEIER,

Petitioners,

vs.

THE PLAQUEMINES PARISH GOVERNMENT, PARISH OF PLAQUEMINES, STATE OF LOUISIANA,

Respondent.

Petition For A Writ Of Certiorari To The Louisiana Supreme Court

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Contrary to the "Question Presented" included in the Petition for a Writ of Certiorari, the question actually presented is whether it is a violation of federal constitutional or statutory law for Louisiana to define "ordinary high water mark" in a manner consistent with the history of the state, its geographic characteristics, its prior jurisprudence and the purpose of the Louisiana constitutional and statutory exemption of "batture" from the compensation requirement.

PARTIES BELOW

Petitioners Warren deSambourg, Mary Burns deSambourg, Albert L. Schell, Jr., Rosalie Elizabeth Tilloy Schell, Sadie Perino, Joseph Perino, Joann Perino, Linda Perino, Charles Mancuso, Angelina Licciardi Mancuso, Joseph Seibert, Sr., Mary Sciambra Seibert, Marie Elena Melerine, Anthony LaGreco, Jr., Salvadore DiCarlo, Emile LaGreco, Joseph LaGreco, Linda Ann Mustacchia LaGreco, Edmond E. Himel, Jr., Erica J. Himel Heier, and Henry G. Heier were plaintiffs-appellants in the proceedings before the Supreme Court of Louisiana.

The Board of Commissioners of the Grand Prairie Levee District, Parish of Plaquemines, State of Louisiana, was the originally named defendant. During the pendency of the appeal before the Supreme Court of Louisiana, petitioners moved to modify the caption of the litigation to reflect that Plaquemines Parish Government succeeded the Levee District. Despite respondent's opposition, petitioners' motion was granted.

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STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari was filed on December 1, 1993 and was received by counsel for respondent on December 3, 1993. This Opposition is filed in accordance with Rule 15.2 of the Supreme Court Rules and is timely as it is filed within 30 days after receipt of the petition. As the 30th day falls on Sunday, January 2, 1994, in accordance with Rule 30 of the Supreme Court Rules, the period for filing extends until the next day, Monday, January 3, 1994.

Respondent Plaquemines Parish Government ("PPG" or "respondent") objects to petitioners' assertion of jurisdiction under 28 U.S.C § 1257(a) because the validity of a treaty or statute is not being drawn into question, nor is a state statute being drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States.

I. INTRODUCTION

> The banks of navigable rivers or streams are private things that are subject to public use.
>
> The bank of a navigable river or stream is **the land lying between the ordinary low and ordinary high stage of the water.** Nevertheless, when there is a levee in proximity to the water, established according to law, the levee shall form the bank. Louisiana Civil Code article 456 (emphasis added).
>
> The land lying between the edge of the water at its ordinary low stage and the line which the edge of the water reaches at its ordinary high stage, that is **the highest stage that it usually**

> **reaches at any season of the year** – is called the bank of the stream, and belongs to the owner of the adjacent land. *Wemple v. Eastham*, 150 La. 247, 90 So. 637, 638 (1922) (emphasis added), *quoted* [in part] in Revision Comment (d), Louisiana Civil Code article 456 (1978).
>
> For purposes of interpretation of article 655 of the Louisiana Civil Code and Article 16, Section 6 of the Louisiana Constitution of 1921, **the Louisiana Supreme Court has consistently defined batture as the area between ordinary low and ordinary high stage of the water of a navigable river.** 2 Yiannopoulos, Louisiana Civil Law Treatise – Property § 57 at 175 (1980) (emphasis added).

The petitioners/landowners' theory of the case is irreconcilable with the foregoing authorities. As evidenced by the third authority cited above, even the landowners' distinguished co-counsel in the state courts has acknowledged that the Supreme Court of Louisiana has consistently defined batture, for the purposes of the levee servitude, as "the area between the ordinary low and ordinary high stage of the water. . . . " The only codal reference to ordinary high stage of the water is in Louisiana Civil Code Article 456; the Revision Comment to that article cites with approval *Wemple v. Eastham's* definition of ordinary high water stage as the highest stage that the river usually reaches at any season of the year.

A synthesis of these authorities produces the inevitable conclusion that batture is the land lying between the ordinary low water stage and the highest stage that the river can be expected to reach at any season of the year. The determinative factual issue in this case is whether the

fill material removed from the landowners' property was located above or below that river stage. The overwhelming weight of the evidence established that all of petitioners' land on the unprotected side of the Mississippi River levee were well below that stage of the river, as it had been ordinarily covered by the river on an annual, seasonal basis for well over one-hundred years (*i.e.*, for as long as there have been records, photographs, maps and surveys documenting the behavior of the Mississippi River at this location).

The trial court considered petitioners' argument that the water stage should be established by considering both profiles and vegetation studies. However, the trial court, as it was within its discretion to do, carefully weighed and balanced the testimony of the experts and concluded that the overwhelming weight of the expert testimony supported a finding of mean high water at 11.0 feet. This was a finding of fact, and the Court of Appeal correctly affirmed, finding no abuse of discretion. The Supreme Court of Louisiana also affirmed, and there is simply no error here justifying the granting of a writ of certiorari.

In its decision affirmed by the appellate court, the Supreme Court of Louisiana, and the Supreme Court of Louisiana on rehearing, the trial court did not address the applicability of the Equal Footing doctrine simply because it was not an issue raised by petitioners. Hence, this Court should not consider this petition. Rather, the court distinguished the federal definition of high water mark for purposes of the federal government's navigational servitude from Louisiana jurisprudence, specifically focusing on the public's Louisiana Civil Code

Article 665 servitude and the rights of the riparian landowner.

The trial court cited two main cases in support of its conclusion. In *Wemple v. Eastham*, 90 So. 637 (La. 1922), the court defined the ordinary high water stage as being "the highest stage that the river *usually* reaches at any season of the year . . . ". In *Boyce Cottonseed Oil Manufacturing Co. v. Board of Com'rs*, 107 So. 506 (La. 1925), the court utilized the term "annually" and incorporated ordinary high water as the upper boundary of batture. After citing these cases, the trial court logically concluded that:

> In the court's opinion, it is more appropriate to employ a method which satisfies the terms of "ordinary" and "annually" by looking to statistics regarding the elevations the river usually reaches during approximately each year over a sufficient period of time in which to support a reasonable finding of what is the ordinary high water stage. Pet. Appendix C, p. 48a.

The Louisiana Fourth Circuit Court of Appeal affirmed the ruling of the trial court. Again, the Fourth Circuit Court of Appeal did not address the Equal Footing doctrine. Instead, the appellate court concluded that where the testimony of expert witnesses differ, the trier of fact has great discretion in determining the credibility of the evidence and a finding of fact in this regard should not be overturned unless clearly wrong, citing *A. Copeland Enterprises v. Harimaw, Inc.*, 528 So.2d 707 (La. App. 5th Cir. 1988). The Fourth Circuit further stated that in the instant case both the plaintiffs' and defendant's

experts were equally qualified and the trial judge's adoption of defendants' position was within the exercise of his discretion. Pet. Appendix D, p. 71a.

The Supreme Court of Louisiana and the Supreme Court of Louisiana on rehearing affirmed the decision of the trial court and the court of appeal. The Supreme Court cited *State v. Richardson*, 140 La. 329, 72 So. 984 (La. 1916), a case cited with approval by petitioners. In *State v. Richardson*, the Supreme Court summed up the status of the law on this issue as follows at 72 So. 991:

> The state of Louisiana, in virtue of her sovereignty, became the owner of all lands underlying the navigable waters within her territory, below mean high-water mark, with power to determine the rights of riparian proprietors with respect thereto, subject only to the limitations imposed by, and under, the Constitution of the United States; and, in the exercise of that power, she has enacted laws which have been read into the titles of all lands bordering upon such waters in which declare, in effect, that the property of the beds of navigable streams is in the public, so long as they are covered with water; that the banks are "that which contains" the river, in its ordinary state of high water, and belong to the adjacent proprietor, subject to a servitude of use in favor of the public; . . .

The Supreme Court of Louisiana cited *State v. Richardson* in support of its conclusion that the laws and jurisprudence of France, sister states and the United States are irrelevant to the resolution of the meaning of ordinary high water in relation to the levee servitude and the rights of riparian landowners in Louisiana.

The Supreme Court cautioned that:

> The phrase must be construed in the context of the nature of batture and the history and purpose of Louisiana's batture exemption. Therefore, contrary to plaintiffs' contentions, Louisiana is not bound to indiscriminately follow a federal or common law definition of ordinary high water which has no connection to our definition of batture, the levee servitude or riparian landowner rights, as set forth in our Constitution, legislation or jurisprudence.

Pet. Appendix A, pp. 24a-25a.

Further, the Court concluded that its definition of ordinary high water

> peacefully coexists with the purpose of the batture exemption, as it exposes a sufficient land surface for the exemption to be practicably utilized. A more restrictive meaning of ordinary high water would threaten the social utility of the exemption, as well as emasculating its practical purpose.

Pet. Appendix A, p. 22a. Petitioners have not addressed the public policy underlying an exemption from compensation of batture, nor have they addressed the applicability of the definition of batture to levee servitude and riparian obligations. What petitioners have merely done is state a legal premise without foundation and attempt to apply a definition of ordinary high water mark to the Equal Footing doctrine that is not applicable in the case at bar.

The landowners know – and admit – that the river usually covers the property in question during the high water season of each year. That is why they disregard

water stages, completely ignore the seasonal behavior of the river, and instead focus on a physical "mark" or "line" that their experts allegedly found near the edge of the river at low water. This "mark," according to petitioners, somehow reflects the natural action of the current of the river over time (even though respondent's experts established that petitioners' "natural demarcation line" runs squarely through areas of man-made clearings and excavations made over the past twenty years, and is likely nothing more than the rim of an old borrow pit), but has nothing to do with how high the river usually rises each year.

Thus, to accept petitioners' theory of the case, one must conclude that from the very inception of Louisiana civil law and the Louisiana Civil Code, the Supreme Court of Louisiana and countless other authorities have erroneously included the word "high" as an unnecessary word in the phrase "ordinary high water stage." According to petitioners, this phrase must be defined in a way that does not consider how high the river rises every year. If this approach is correct, one wonders how and why the word "high" found its way into Louisiana Civil Code Article 456. If the redacters of Louisiana Civil Code Article 456 did not intend to set the upper limit of the bank as the highest stage ordinarily reached by the river, why did they not simply set the "ordinary water stage" as the upper boundary of the river, as opposed to the "ordinary high water stage?" Is this a centuries old mistake that these petitioners only now have discovered?

Certainly not. In the final analysis, it is clear that the petitioners, in an effort to revamp the Louisiana civil law in a manner that supports their factual position in this

case, seek to define the upper limit of the river bank at a point somewhere **between** the ordinary low and ordinary high stages of the river, a point that their experts conveniently located below the excavations at issue in this case. Yet the Louisiana Civil Code gives no recognition to such a demarcation line, and instead describes the natural bank of the river as an area which, by definition, will **sometimes be covered** by the river and **sometimes not**, *i.e.*, the area between ordinary low and ordinary high water mark. Petitioners, on the other hand, have located the "high water mark" at a point that is almost always under water, even when the river at the subject location is three to four feet lower (*i.e.*, 7 to 8 feet in elevation) than the highest stage that it usually reaches each year (11.0 feet). In this case, as the Louisiana trial court, the Louisiana Court of Appeal and the Louisiana Supreme Court recognized, the Louisiana Civil Code should control.

II. SUMMARY OF ARGUMENT

A. The trial court's factual determination that Shingle Point is ordinarily covered by the Mississippi River during the high water season each year was supported by the evidence and cannot be characterized as "manifestly erroneous" or "clearly wrong." *Lirette v. State Farm Ins. Co.*, 563 So.2d 850 (La. 1990). Similarly, the trial court's implicit rejection of the landowners' assertion that the Mississippi River overflows its natural bank, or floods, when it reaches an elevation of 11.0 (as it ordinarily does each year) was also amply supported by the evidence. Finally, the trial court's factual determination that "mean high water" analysis accurately measures the ordinary behavior of the river was supported by the substantial

evidence. None of these findings of fact can fairly be characterized as "manifestly erroneous" or "clearly wrong," and thus, as the Louisiana Court of Appeal and the Supreme Court of Louisiana recognized, all such findings should be affirmed.

B. Once having reached the factual conclusions outlined above, the trial court correctly applied basic principles of Louisiana property law, and the court of appeal correctly affirmed the application of those principles. In particular, the trial court correctly determined that: (1) batture is the land located between the ordinary low and ordinary high stages of the river; (2) the ordinary high stage of the river, under Louisiana law, is the highest stage that the river can be expected to reach in any season of the year; and (3) common law and federal law authorities regarding the ordinary high water mark, upon which petitioners rely, do not answer the civil law property issues posed by this case. Having so concluded, the trial court properly determined, and the Supreme Court of Louisiana properly affirmed, that Shingle Point is batture, and that under Louisiana law, no compensation is owed to petitioners for the levee material removed from their property.

C. When boiled down to its bare essence, the question raised by petitioners is whether the definition of "batture" adopted by a Louisiana trial court, a Louisiana court of appeal and the Supreme Court of Louisiana conflicts with the Equal Footing Doctrine or the Fifth and Fourteenth Amendments of the United States Constitution and allegedly results in a taking without compensation. Petitioners base their entire argument on the premise that under the Equal Footing Doctrine, all states

must define ordinary high water mark in a similar way. Petitioners present absolutely no authority for this position, but can only cite several definitions of "ordinary high water mark" which conflict with the Louisiana decision.

There is no merit to petitioners' assertions. The Equal Footing doctrine did not define "ordinary high water mark" and there has been no universal adoption of a definition of "ordinary high water mark". In fact, petitioners admit at Petition for Writ of Certiorari at p. 22, "The term 'ordinary high water' has no 'immutable' definition." *United States v. Cameron*, 466 F.Supp. 1099, 1110 (D.C. Fla. 1978). Petitioners also cite *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 427, 14 L.Ed. 189 (1851) as adopting a "mark" definition of high water, supposedly followed by Louisiana courts in *Wemple v. Eastham*, 150 La. 247, 90 So. 637, 638 (1922), *State v. Richardson*, 140 La. 329, 72 So. 984, 990 (1916) and *Edmiston v. Woods*, 566 So.2d 673, 675-676 (La. App. 2nd Cir. 1990). See Note 9, Petition for Writ of Certiorari at pp. 22-23. Quite the contrary is true. The *Howard* case did not concern the Equal Footing doctrine but rather the location of the boundary line between the states of Georgia and Alabama. Second, in *Wemple v. Eastham, supra* at 638, the court defines "ordinary high water stage" as "the highest stage that it [the river] usually reaches at any season of the year". Further, a careful reading of *Richardson, supra*, which did not attempt to define the ordinary high water stage, discloses no discussion of anything remotely similar to the "ordinary high water mark" test. Petitioners also inaccurately state that the *Edmiston v. Woods, supra*, court used a "mark" test to determine the location of high water. In

reality, the *Edmiston* court did not use any "test" to determine high water. No test was necessary because the parties stipulated that the land in question was situated above the river bank and was only occasionally flooded by "backwater" from the river.

Petitioners cite several cases allegedly defining "ordinary high water mark". One case cited by petitioners is *United States v. Cameron*, 466 F.Supp. 1099 (M.D. Fla. 1978). However, *Cameron* supports the respondent's contentions. In *Cameron*, the United States sought to compel a riparian owner to remove a dike allegedly constructed in violation of the Rivers and Harbors Act. The Equal Footing doctrine was not at issue. However, the court did extensively consider the correct manner to determine an ordinary high water mark. Of special interest are the court's comments at p. 1111:

> What these cases suggest is that the "ordinary high water line" is *not readily susceptible to a uniform and precise definition which provides guidance for each and every* case. Rather, the term is best regarded as a concept which denotes the point at which the bed or a lake or river ceases and the shore or fast lands begins, a point which may be capable of proof by a variety of methods depending upon the facts and circumstances of the particular case. . . . There is no logical reason why a fourth approach to determine the line of ordinary high water may not consist of comparing reliable water stage and elevation data. Indeed, for a body of water whose levels fluctuate considerably with changes and climate, accurate water stage and elevation data may

> provide the most suitable method for determining the ordinary high water mark. (emphasis added)

Hence, under *Cameron*, there is no uniform definition of "ordinary high water line", contrary to assertions of Petitioners.

III. ARGUMENT

(A) THE LEVEE SERVITUDE

Louisiana law imposes a servitude for the common utility on lands abutting navigable rivers for the construction and repair of levees. *Mayer v. Board of Com'rs for Caddo Levee Dist.*, 177 La. 1119, 150 So. 295, 296 (1933). This servitude is presently codified in Louisiana Civil Code Article 665, which provides in pertinent part that:

> Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

The origins of the levee servitude pre-date Louisiana statehood. "From the earliest colonial days, when the Louisiana territory was in possession of France and Spain, no grants of lands were ever given without a specific reservation being made therein for the common use of the public of all rights to the shores of rivers and bayous upon which they might front." *Dickson v. Board of Com'rs of Caddo Levee Dist.*, 210 La. 121, 26 So.2d 474, 478 (1946). This reservation was incorporated into the first Louisiana Civil Code (1808) and all subsequent civil

codes. *See* Louisiana Civil Code of 1825, Article 661; Louisiana Civil Code of 1870, Article 665.

"Appropriation" is the governing authority's exercise of the levee servitude through the taking of riparian property for the purpose of building and/or repairing levees. Appropriation is a distinct concept from expropriation, as the Louisiana Supreme Court explained in *Dickson, supra*:

> . . . while in all of the remaining states of the Union lands necessary for levee purposes can only be used after expropriation and proper indemnification, in Louisiana the state has the right to act first, i.e., the authority to appropriate such land to a use to which it is subject under its very title, and talk later.

26 So.2d at 478.

Because under Louisiana law all private riparian tracts are subject to the levee servitude and have never been owned free of the burden thereby imposed, the appropriation of riparian property does not require payment of "just compensation" under the Fifth Amendment to the United States Constitution. *General Box Company v. United States of America*, 351 U.S. 159, 76 S.Ct. 728, 100 L.Ed. 1055 (1956); *Eldridge v. Trezevant*, 160 U.S. 452, 16 S.Ct. 345, 40 L.Ed. 490 (1896); *Delaune v. Board of Commissioners*, 230 La. 117, 87 So.2d 749, 751 (La. 1956). The state may compensate riparian owners for the exercise of the levee servitude if it so chooses, but any such compensation is "merely a gratuity" that is not mandated by the Fifth Amendment. *Delaune, supra*, 87 So.2d at 752.

In the early days of Louisiana statehood, levees were built and maintained by and at the joint expense of riverfront proprietors. Public authorities assumed full responsibility for construction and maintenance of levees by the conclusion of the Civil War. Initially, no compensation was paid to riparian owners for property appropriated from them for levee purposes, on the rationale that all such owners received the benefit of protection afforded by the levees. *See generally, Dickson, supra,* 26 So.2d at 478-80; *Mayer, supra,* 150 So.2d at 296-297. *See also Wolfe v. Hurley,* 46 F.2d 515, 520 (W. D. La. 1930), *aff'd,* 283 U.S. 801, 51 S.Ct. 493, 75 L.Ed. 1423 (1931).

The first instance of compensation was Article 312 of the Louisiana Constitution of 1898, which provided in pertinent part that "[a]ny person whose property has been appropriated . . . by the Orleans Levee Board for levee purposes, shall have a right in action against said Board . . . for the value of said property . . . ." Riparian owners outside of Orleans Parish remained uncompensated for appropriations. *Wolfe v. Hurley, supra,* 46 F.2d at 520.

Article 16, § 6 of the Louisiana Constitution of 1921, however, extended a form of compensation to all riparian owner based on assessed value. In 1974, assessed value was substituted with "as provided by law" as the constitutionally prescribed measure of compensation. Subsequent to the passage of the 1974 Constitution, the Legislature enacted La. Acts 1978, No. 314, which amended La. R.S. 38:281 to provide that, with the exception of Orleans Parish, lands actually used or destroyed for levee purposes "shall be paid for at fair market value to the full extent of the loss . . . ." A year later the

Legislature again amended La. R.S. 38:281 by Acts 1979, No. 676, which provided that the measure of compensation for such lands "shall be the fair market value of the property taken or destroyed before the proposed use of the property . . . ."

Finally, in 1985, the Legislature amended and reenacted Title 38 through Acts 1985, No. 785. The statute which now provides the measure of compensation for appropriated riparian property is La. R.S. 38:301(C)(1)(a). This provision requires for payment "at fair market value to the full extent of the loss."

While there have been significant changes over time in the measure of compensation for appropriated property (from no compensation, to assessed value and then to fair market value), one rule has remained constant and inflexible: **no compensation is owed for batture.** An exemption from compensation for batture was contained in Art. 312 of the Constitution of 1898, the first provision authorizing payment for appropriated property ("Any person whose property has been appropriated . . . shall have a right of action . . . provided that this shall not apply to batture property . . . .") The batture exemption was repeated in the Louisiana Constitution of 1921 ("Land and improvements thereon actually used or destroyed for levees . . . shall be paid for . . . provided, this shall not apply to batture . . . .")

It is apparent from the jurisprudence and the plain wording of the last three state constitutions that batture is indeed exempt from compensation. However, the Louisiana Constitution of 1974 does not define batture (nor did

the Louisiana Constitution of 1921), and La. R.S. 38: 281(1) provides simply that "[b]atture as used in this Section shall have the same meaning as that term was defined by the courts of this state as of the effective date of the Louisiana Constitution of 1974." Therefore, the ultimate issue for the purposes of this case is . . .

(B) WHAT IS BATTURE?

(1) Common Usage and Uniqueness to Louisiana

As was apparent throughout the trial of this case, lay persons, experts and officials of the Corps of Engineers routinely use the word "batture" to refer to all land along the Mississippi River that is located between the artificial levees on each bank. *See, e.g.*, D-184, U.S. Army Corps of Engineers study defining batture along the Mississippi as land between the levees. *See also* testimony of petitioners' lead expert, Luther Holloway, III, 251-252. Certainly, as will be discussed further below, most delegates to the Louisiana Constitutional Convention of 1973, who voted overwhelmingly to maintain the historical exemption of batture from the requirement of compensation otherwise applicable to property taken for levee purposes, certainly used the term in that fashion.

Perhaps, as addressed below, the legal meaning of the term batture is more restrictive than its common usage – indeed, the trial court held that the petitioners' property is batture under a more restrictive definition of that term than suggested by its common usage (by holding that all property below the high water stage, but not necessarily all property on the unprotected side of the

levee, is batture). However, even if the common usage of the term is broader than its legal meaning, as the trial court held, there are at least two important reasons why the common usage of the term should not be glossed over too quickly.

First, the common understanding of the term is a reminder that the batture issue is unique to Louisiana. One does not hear natives of other states using the term; nor is respondent aware of any other state which has the equivalent of a batture exemption. Louisiana property law did not spring up out of a vacuum, but instead reflects the geographic realities of this state. Accordingly, any resolution of the batture issue should be made with reference to Louisiana law and the factors which influenced its development and evolution.

Furthermore, Louisiana property law regarding navigable rivers and their adjoining lands should be understood in the context of the fact that artificial levees, in some form or another, have existed along the banks of the lower Mississippi River for virtually as long as Louisiana has been a state. (Testimony of Kesel, VI, pp. 162, 164-65). An artificial levee has existed at the subject location since at least 1850, in the same location where the artificial levee exists now. (*Id.*, pp. 172-73). Thus, the original redacters of Louisiana law would never have contemplated that land on the protected side of the artificial levee, shielded from the river regardless of its elevation, would be batture.

A second reason why the common usage of the term batture is important is that the trial court has already restricted the batture definition for legal purposes by not

automatically classifying all property on the unprotected side of the levee as batture. Fair enough, perhaps, but it should be understood that petitioners seek to do more than restrict the meaning of that term – essentially, they would obliterate batture as a distinct concept by classifying it as property that is under the surface of the river almost all of the time – property which would never have any utility for any purpose and thus would hardly need to be exempted from compensation for levee purposes. Surely the delegates to the Constitutional Convention of 1973 did not waste their time debating over a "batture exemption" that was of no practical consequence. In summary, respondent has advocated a civil law resolution to this case from the outset for a reason: the issue is inherently unique to Louisiana, and demands a civil law solution.

(2) Legal Meaning

The term batture has been given at least three different meanings by Louisiana courts in different contexts. Yiannopoulos, Louisiana Civil Law Treatise, Vol. II, Property, § 57 (1980). One common use of the term "batture" has been as a general reference to lands of alluvial origin. There are literally dozens of cases which refer to such "batture" when discussing the ownership rights of lands created by accretion. *See, e.g., River Lands Fleeting v. Ashland Plantation*, 498 So.2d 38 (La. App. 1st Cir. 1986), *writ denied*, 502 So.2d 565 (La. 1987); *Heirs of Leonard v. City of Baton Rouge*, 39 La. Ann. 275, 4 So. 241 (1886). *See also Harper v. Learned*, 6 So.2d 326 (La. 1942), generally referring to some 2,000 acres of riparian land as batture, and

Oliver v. Milliken & Farwell, Inc., 290 So.2d 738 (La. App. 1st Cir.), *writ denied*, 294 So.2d 549 (La. 1974), generally referring to 3,500 acres at "Solitude Point" on the Mississippi River as batture.

Secondly, the term batture has also been used to generally describe land formations in the bed of a river, below the ordinary low water stage. Yiannopoulos, *supra* at 174. *See, e.g., Warriner v. Bd of Comm'rs of Port New Orleans*, 132 La. 1098, 62 So. 157 (1913).

For the purposes of appropriation of riparian property pursuant to the levee servitude, however, batture has consistently been defined in a third and more specific manner. Professor Yiannopoulos has observed that "[f]or purposes of interpretation of Article 665 of the Louisiana Civil Code and Article 16, Section 6 of the Louisiana Constitution of 1921, the Louisiana Supreme Court has consistently defined batture as **the area between ordinary low and ordinary high stage of water of a navigable river.**" Yiannopoulos, *supra*, at 175 (emphasis added).

The specific jurisprudential definition referred to by Professor Yiannopoulos was initially recited in *Boyce Cottonseed Oil Mfg. Co. v. Bd of Comm'rs*, 160 La. 727, 107 So. 506, 508 (1926) as follows:

> The batture is that part of the river bed which is uncovered at the time of low water, but is covered annually at the time of *ordinary* high water; when it ceases to be covered at the time of ordinary high water, it ceases to be *batture* and becomes *bank* of the river. (emphasis in original).

See also General Box Co. v. United States, 351 U.S. 159, 76 S. Ct. 728, 100 L. Ed. 1055 (1955).[1]

(C) WHERE IS THE ORDINARY HIGH WATER STAGE?

(1) The Inquiry Under the Louisiana Law

The ordinary low and ordinary high water stages of a navigable river are defined by Louisiana law with reference to both the **bed** and the **bank** of the river. Modern Louisiana jurisprudence defines the **bed** of a navigable river as "the land covered by the water in its ordinary low stage." Yiannopoulos, *supra*, Vol. II, § 52 at p. 154, citing *Wemple v. Eastham, supra*. In other words, the bed of the river is the area always covered by the open flow of

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[1] The *Boyce* court's reference to the "bed" and "bank" of the river should be understood with reference to the manner in which those terms were then defined by Louisiana courts. Initially, Louisiana courts defined the bed of a river as the area bordered on each side of the river by "the ordinary stage of high water," and the bank was the area "above the ordinary high water mark." Yiannopoulos, Louisiana Civil Law Treatise, Property, Vol. II, § 52, pp. 152-53, and § 46, p. 132, n. 136 (1980). Over time these terms were redefined by the jurisprudence, and it is now well established that the *bed* of a navigable river is the area between the ordinary low water stages, *id.* at p. 154. The *bank* is either the land lying between the ordinary low and ordinary high water stage, or, if there is a levee in proximity to the water, the levee itself forms the bank. *Id.*; La. Civ. Code art. 456 (1978). Thus the land area between ordinary low and ordinary high water identified as batture in the *Boyce* decision should be equated with the natural bank of the river. Yiannopoulos, *supra*, § 57 at pp. 174-76, whereas the "bed" of the river lies between the ordinary low water stages that form the lower boundary of each bank.

the river, except perhaps when the river's elevation drops below its ordinary low water stage. The ordinary low water stage is determined by **averaging** low water readings in order to calculate an average or "mean" low water mark. *See, e.g., State v. Placid Oil Co.*, 300 So.2d 154, 164, vacated on other grounds on rehearing, 300 So.2d 172 (La. 1974); *Esso Standard Oil Co. v. Jones*, 233 La. 915, 98 So.2d 236 (La. 1957).

The **banks** of a river are explicitly defined by Louisiana Civil Code Article 456 as follows:

> The bank of a navigable river or stream is the land lying between the ordinary low and the ordinary high stage of the water. Nevertheless, when there is a levee in proximity to the water, established according to law, the levee shall form the bank.

This definition codifies Louisiana jurisprudence. *Wemple v. Eastham, supra*; *State v. Richardson*, 140 La. 329, 72 So. 984 (1916). See Revision Comment (d), Louisiana Civil Code Article 456.

Louisiana Civil Code Article 456 does not define "ordinary high water stage." However, the same jurisprudence which provides the definition of river bank now contained in Louisiana Civil Code Article 456 explicitly defined "ordinary high water stage" as **"the highest stage that it [the river] usually reaches at any season of the year . . . ."** *Wemple v. Eastham, supra*, 90 So. at 638. The definitions of river bank and ordinary high water provided by *Wemple v. Eastham* remain the law of Louisiana, and are cited with approval in Section (d) of the 1978 Revision Comments to Louisiana Civil Code Article 456.

While petitioners disparage *Wemple*, they have been unable to find a Louisiana case that defines ordinary high water any differently.

(2) The Inapplicability of the "Equal Footing Doctrine"

While the appeal of this case was pending before the Louisiana Fourth Circuit Court of Appeal, petitioners first raised the argument that the "equal footing doctrine" requires all states to define the ordinary high water stage using the same methodology. Petitioners' failure to raise this issue before the trial court should constitute a waiver of their right to raise the matter on appeal, but even if this Court deems it appropriate to consider the issue, petitioners' argument is without merit.

Petitioners suggest that since all fifty states received title to lands under navigable rivers up to ordinary high water, that point of demarcation must be determined through the same scientific method in all cases, wherever decided. The major problem with this argument is that it advocates an impossibility. As even petitioners' lead expert admitted, the approach used for determining ordinary high water varies from location to location. *See* P-30, **petitioners' own exhibit**, the U.S. Corps of Engineers report specifying that both physical fact determinations and statistical methods are two "commonly used" approaches to determining ordinary high water. In locations where there is no remaining natural bank in existence at all (*e.g.*, along the Mississippi River in the City of New Orleans) or where there is a natural bank that has

been affected by man-made activity and/or the placement of an artificial levee (this case), petitioners' "physical criteria" approach, relying as it supposedly does on the natural contours of the bank, is virtually useless. This is particularly so when the artificial levee has been built over the natural levee, perhaps forever obscuring the true line of demarcation that petitioners' experts sought to locate at Shingle Point. Indeed, 70% of the areas along the banks of the Mississippi River have been lined with concrete revetments. (Kesel, VI, pp. 162-63). On the other hand, there may well still be locations and rivers where petitioners' "physical fact" approach is more useful than it was here, at least when used in combination with other modes of analysis, including statistical analysis.

Geographic reality may require varying methodologies for determining ordinary high water at different locations on the same river in the same state, much less for different rivers in different states. Given this reality, a court should not try to fashion a rigid and mechanical test applicable to all cases, but should simply weigh the evidence presented and determine on the basis of that evidence where the ordinary high water stage is located.

Furthermore, petitioners confuse the issue by comparing the area of the river bed granted to Louisiana under the equal footing doctrine with the area covered by the riparian servitude contained in Louisiana Civil Code Article 665. The two areas are not the same, as the servitude for the making and repairing of levees applies not only to the land ceded under the equal footing doctrine, but to the **entirety** of all tracts of land that were riparian

(*i.e.*, abutting a navigable river) at the time that Louisiana became a state – no matter how far landward those tracts extended. *See generally Delaune v. Board of Com'rs*, 230 La. 117, 87 So.2d 749, 751 (La. 1956); *Dickson v. Com'rs of Caddo Levee Dist.*, 210 La. 121, 26 So.2d 474 (1946). Therefore, the definition of the natural bank of the river contained in Louisiana Civil Code Article 456 does not classify river banks as "private things subject to public use" pursuant to the authority of the equal footing doctrine, but on the basis of the servitude of public use, and, as Professor Yiannopoulos has acknowledged, Louisiana Civil Code Article 456's definition of the natural bank is identical to the definition of batture employed for the purposes of the levee servitude contained in Louisiana Civil Code Article 665. **Accordingly, even if the "land lying between the ordinary low and ordinary high stage of the water" referred to in Louisiana Civil Code Article 456 encompasses an area larger than the area to which Louisiana received title under the equal footing doctrine (which has not been established), there would be no inconsistency between federal and state law. The state is not limited to imposing a servitude of public use over only the lands to which it received title from the federal government under the equal footing doctrine.**

Indeed, the very federal regulation from which petitioners' experts derived their definition of ordinary high water mark provides that "ownership of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing upon the existence or extent of the dominant federal jurisdiction over a navigable water

body." 33 C.F.R. 329.11. (Patrick, IV, p. 35). Conversely, the extent of land originally deeded to Louisiana under the equal footing doctrine, and now subject to the federal navigational servitude, has no bearing on the extent of Louisiana's riparian servitude. The resolution of issues presented regarding the exercise of the riparian servitude (*i.e.*, what is batture) do not even implicate the equal footing doctrine, and thus do not require conformity with "ordinary high water mark" analysis utilized in federal cases for the purpose of defining federal rights.

In the final analysis, the "equal footing doctrine" does not require this Court to hastily re-interpret the traditional Louisiana definition of river bank and/or ordinary high water stage in order to "conform" Louisiana law to something a court held in Iowa, Wisconsin or anywhere else. The resolution of this case according to traditional civil law principles is hardly a violation of federal law.

(3) Methodologies for Answering the Inquiry Posed by Louisiana Law

Utilizing the Louisiana law definition of ordinary high water stage, how does one find "the highest stage that the river can be expected to reach in any season of the year?" The answer should be: by reliance upon **any evidence** probative of that issue. Contrary to petitioners' depiction of the position of respondent as being based totally on statistics, respondent has **never** asserted that river gauge data is the only relevant evidence. Respondent freely agrees with petitioners that lay testimony is relevant – and believes that the lay testimony of the only

landowner called to testify in this case (Warren deSambourg) fully supports its position. Respondent also acknowledges that evidence regarding vegetation may be relevant – which is why it called a botanist, Dr. Lowell Urbatsch, as one of its expert witnesses to confirm that the vegetation on Shingle Point is composed of plants and trees that routinely withstand seasonal inundation by the river.[2] Finally, respondent obviously contends that extensive (and non-statistical) evidence such as the historical characteristics of Shingle Point – as shown through maps, surveys and photographs – is relevant, as its lead expert, Dr. Kesel, testified at length on such issues. Indeed, only a small portion of Dr. Kesel's lengthy testimony (consisting of 338 transcript pages) involved statistical analysis. Accordingly, it is a gross mischaracterization of the evidence for petitioners to suggest respondent solely relied upon statistics and ignored the physical characteristics of the land.

On the other hand, respondent certainly contends that over one hundred years of recorded river gauge data is relevant to the question of the highest stage that the river can be expected to reach in any season of the year. In actuality, it is the petitioners who are advocating an "arbitrary" approach by urging this Court to disregard such probative evidence.

The large volume of river gauge data available to respondent's experts (and to petitioners' experts, had they chosen to examine it) served as a basis for their

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[2] Dr. Urbatsch is a professor of botany at Louisiana State University, where he has been employed since 1975.

determination of the "average" or "mean" high water stage at Shingle Point. "Mean annual high water" is a scientifically accepted and frequently-used approach which accurately reflects the noted components of the legal definition of ordinary high water. Curtis Barrett, qualified as an expert hydrologist and civil engineer, testified that mean annual high water, derived from averaging the annual river stage peaks at a given location, is frequently used by the United States Corps of Engineers as "a common variable . . . to describe the **normal upper-bound** of a river and its behavior . . . ." (Barrett, V, p. 274). Indeed, petitioners' own exhibits confirm the Corps' reliance on this concept. The published Corps data relied upon by petitioners' hydrologist (P-11) contains two tables which reference the "Annual Highest and Lowest Stages" at Carrollton and Braithwaite, respectively, and which contain references to "high mean" stages that were calculated by averaging annual high water readings. Petitioners are thus reduced to arguing a concept documented by their own exhibits as arbitrary and meaningless.

(4) Petitioners' Criticisms of "Mean High Water" Methodology

Petitioners cannot dispute that methodology similar to mean high water methodology has been utilized for determining the ordinary low water stage. *See, e.g., State v. Placid Oil Co.*, 300 So.2d 154, 164, vacated on other grounds on rehearing, 300 So.2d 172 (La. 1974); *Esso Standard Oil Co. v. Jones*, 233 La. 915, 98 So.2d 236 (La. 1957). Indeed, petitioners' lead expert repeatedly equated

the ordinary low water stage with "mean low water." (Holloway, III, pp. 125, 130-31, 155, 256 and 267). Petitioners have never adequately explained why a mean water level analysis suffices for defining the lower boundary of the bank, but not for the upper boundary. Utilization of a mean high water approach to define the upper boundary (together with other evidence) certainly does not contradict any reported Louisiana case, and instead is consistent with Louisiana Civil Code Article 456, the language of the *Wemple* and *Boyce* decisions, and the methodology for defining the low water stage.

Yet it is the petitioners, not respondent, who have not cited any applicable authority for the central proposition asserted. Note that as soon as the petitioners begin to cite authorities in support of their definition of ordinary high water, they are forced to rely upon cases from Florida, Wisconsin, Arkansas and other common law jurisdictions.

(IV) CONCLUSION

Petitioners have not stated a valid case for this Court to grant the requested writ. Louisiana's definition of batture in no way impedes upon Fifth Amendment rights nor does it conflict with any federal statutory or constitutional provision. The state courts were faced with a factual finding of an appropriate definition for ordinary high water mark based upon the facts of its case. The trial court made this determination and the trial court's determination should be upheld. This Court's affirmance of the courts below does not require a holding that evidence as to soil and vegetation characteristics is irrelevant to a determination of the ordinary high water stage – the trial

court recognized that such evidence could be relevant, and respondent has never contended otherwise. Instead, this Court may affirm the courts below for the simple reason that respondent's evidence as to the location of the ordinary high water stage was credible and probative, whereas the petitioners' evidence on that issue was not. Respondent Plaquemines Parish Government, Parish of Plaquemines, State of Louisiana respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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